Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE QUESTION OF FEDERAL DISPOSITION OF STATE WATERS IN THE PRIORITY STATES[1]

WHICH has the authority, — the federal government or the state, — to dispose of the waters of the streams in our priority states? In other words, which of the two is to determine what the system of water rights for the state shall be, — for instance, whether riparian or priority, — and to dispose of rights to water thereunder? Here we have the greatest and most interesting of the many unsettled questions in the law of western water rights.

What difference does the decision make? A very decided one. If, for instance, the federal government has the authority, then the State Engineer of Wyoming is wrong in his contention that the Reclamation Service has no right to divert from the North Platte in Wyoming a large quantity of water for the irrigation of land in a neighboring state; and the Department of Justice at Washington is right in the position which it has recently taken in asserting that all stream waters not yet appropriated in the priority states are subject to disposition by the federal government and not by the state.

If the authority in question is lodged in the federal government, then, except to the extent of the government's consent, the state may not ordain or maintain any system of water rights at all or determine by whom rights to water may be acquired or upon what terms or what the nature of the right shall be.

Such consequences, indeed, justify the inquiry, — which, the federal government or the state, is the disposing authority?

My topic and the method of treating it are such that for the sake of clarity, it is best to state at the outset that I take the position that the power of disposing of the waters of the state is lodged not in the federal government but in the state. The theory by which I reach this conclusion is that there is a distinction between

---

[1] From a recent address before the Colorado State Bar Association at Colorado Springs. The author desires to acknowledge helpful suggestions from Roscoe Pound, Esq., Professor of Law in Harvard Law School.

sovereignty and ownership; that prior to statehood, the United States had sovereignty over but not property in the waters; that by conferment of statehood, this sovereignty was passed to the state which, in consequence thereof, became vested, to the exclusion of the federal government, with power to dispose of the waters and to create either in itself or in others property rights in respect thereto.

Systems of Water Rights

Two distinct systems of water law are known to the people of the United States: first, the riparian; second, the priority or appropriation. A water right, under either system, is not ownership of the water itself as it exists in the natural source of supply but rather of a right to make use of the water. The property is in the *usufruct*, not in the water or *corpus* itself, and under either system, the right is an incorporeal hereditament.[2] Although the rights under the two systems are alike in these respects, there are others in which there is a radical difference. The fundamental principle of the riparian system is that of equality, — equality among the riparian proprietors, not necessarily to equal amounts of water, but in the right to make what, for them respectively and under all the circumstances, is a reasonable use of the waters. The cardinal principle of the priority system, on the other hand, is discrimination, — discrimination in favor of the oldest user or, as he is called, appropriator. When there are many riparian proprietors along a stream, the riparian system does as well by the most recent arrival as by the first, but the priority system awards prior rights to the different users, to the extent of their respective applications to use, in the order of the age of their respective uses, — to the first user or appropriator of water, the first preference or priority to the water, to the second appropriator, the second priority, and so on. The riparian system restricts the use of the water to riparian lands; the priority or appropriation system does not.

Physically, the riparian system is better adapted to lands situated in moist climates while the priority is the better adapted to areas that are dry and mountainous in that frequently the lands are the

[2] Swift *v.* Goodrich, 70 Cal. 103, 11 Pac. 561 (1886); Wyatt *v.* Larimer, etc. Co., 18 Colo. 298, 33 Pac. 144 (1893).

best served by uses of water away from the streams, and that the water being scarce and the expense of transporting heavy, he who undertakes the expense must be assured in advance that those who come after him may not deplete his supply. Better that some users have enough and others none, than that all should go short.

The priority system is exclusively in force in the seven semi-arid states of Colorado, Wyoming, Utah, Nevada, Idaho, New Mexico, and Arizona, and is partially in force in the less arid states of California, Montana, North Dakota, South Dakota, Washington, Kansas, Nebraska, Oklahoma, Oregon, and Texas. The riparian system also is partially in force in these states wherein the priority system is partially in force, and is exclusively in force in all the remaining states of the Union, *i. e.*, in all states wherein the priority system is not in force either exclusively or partially as stated.

Historically, with us, the riparian system is the older of the two and came from England. The priority system, whatever its history may have been elsewhere, is indigenous to our own country and is one of the two bodies of substantive law (the other being mining) given to American law by the West.

The states I have enumerated as states wherein the priority system is in force either partially or entirely, were originally, except as to Texas, portions of a great public domain of the United States acquired for the most part from Mexico, but also in part from France, Great Britain, and from the State of Texas. As for the area which is now the state of Texas, it never was a part of the United States' public domain but having already become free and independent by revolt from Mexico, was admitted directly into the Union. The great public domain thus variously acquired by the United States was, at the time of its acquisition, not private property but almost wholly public domain of the nations ceding it.

Theories Invoked to Legalize the Priority System

The priority system originated among the "forty-niners" of California in what was then neither territory nor state, but the unorganized public domain of the United States, and at first was devoted to mining uses, but later the system spread and the uses were extended until now, as we have seen, seventeen states enforce the system exclusively or partially and the waters may be used for any

and all beneficial purposes. When the forty-niners originated the system, they were without law save of their own making, but later the system was recognized by judicial decisions and legislative enactments of organized territories, states, and of the United States. The first reported case sustaining the priority doctrine was *Eddy* v. *Simpson*,[3] decided in 1853. The first legislative recognition was by the state of California in 1851 by an act [4] providing that:

"In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim . . ."

The first legislative recognition by the United States was the Act of July 26th, 1866, throwing open the mineral portion of the public domain to private acquisition and providing also that:

"Whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain the party committing such injury shall be liable to the party injured for such injury or damage."

The first judicial decision of the United States Supreme Court upholding the priority system was that of *Atchison* v. *Peterson*,[5] decided in 1874. Since these first favorable recognitions there have been many others, both legislative and judicial, from territorial state and federal governments. Two of the later federal statutes, although there are numerous others, deserve especial notice. One was an act [6] passed in 1870, providing that:

"All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used with such water rights as may have been acquired or recognized under [the Act of July 26, 1866]."

---

[3] 3 Cal. 249.

[4] Civil Practice Act, Apr. 29th, 1851, § 621, now found substantially unchanged in Code of Civil Procedure, § 748.

[5] 20 Wall. (U. S.) 507.

[6] Revised Statutes, § 2340.

The other was the Desert Act of 1877[7] providing for the private reclamation of desert lands by conducting water thereto under the priority system, and also providing as to the waters in excess of those so needed that:

"All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

The priority system was, to the people creating and extending it, a novelty. A number of theories were advanced, and are still advanced, for the purpose of legalizing it. The principal theories have been those relating to the source of legal authority, — whether from the federal government or from the state, — for manifestly no rules as to water rights, any more than other rules, can be law at all unless emanating from that one of the two possible sources, which, for the purpose of legalization, is the proper sovereign authority. That between these two theories no final choice has been made by the Supreme Court of the United States is largely due to the fact that in the main the federal government and the state, each in its own way, have supported the priority system. With the two sovereignties thus uniting to uphold the system there has not been the occasion to decide which of the two is the one whose consent is necessary and controlling. Even so, it is surprising that a certain relation between water claimants has not presented to the Supreme Court of the United States long ago, and in compelling manner, this question of source of authority. I refer to the relative claims of a prior riparian proprietor claiming solely as such under a United States patent to riparian land and a subsequent appropriator, both being within a state which by its laws purports to do away entirely with the riparian system, — an issue there being whether it is within the power of a state to dispose of the waters under a priority system as against a prior riparian patentee of riparian land on the same stream, claiming by reason of the priority of his grant, that he receives as an incident thereto, although not expressed, the water right which, more generally speaking, grants of riparian land have always carried in the history of English and American law, namely,

[7] 19 Stats. 377.

a water right under the riparian system. Some day, and soon, however, the issue between prior riparian and subsequent appropriator and the difference between federal and state statutes as to details of the priority system and the rivalry between the forces of federal and state conservation of natural resources must force the decision as to which of the two sovereigns is the authorized disposer of the waters and is, therefore, to be obeyed.

Two theories have been advanced in reference to the source of authority,— one commonly known as the California doctrine, the other as the Colorado doctrine, the former ascribing the authority to the federal government, the latter to the state. More fully the California doctrine may be stated as follows: that when the United States by cession from the ceding nations became the owner of the lands now comprising the priority states it became as well the owner in a strict proprietary sense of the right to use the waters flowing over these lands; that while it was such proprietary owner, statehood or state sovereignty was conferred upon what are now the priority states: that sovereignty is different from ownership, and the conferment of the former upon a state passed only political powers and not property; that in consequence, although the federal government is no longer sovereign in respect to the waters within the priority commonwealths, the United States still has its original property right to use the water just as it continued to own the public lands themselves; that by the federal Constitution,[8] Congress alone may dispose of federal property and, therefore, of this usufructuary right of the United States and, accordingly, no state has a right by virtue of its statehood or sovereignty to determine what system of water rights shall prevail therein or who may be the owner of such rights or how they may be acquired or for what purpose; that no one has acquired or can acquire any usufructuary right in the waters except by and with the consent of the federal government; that the Act of '66 and the Desert Act of '77 (to both of which I have referred) the principal federal statutes purporting to create priority rights to the use of water in others than the United States, are really grants of property rights in the use of water to unnamed grantees, to take effect upon performance by them of the physical acts (appropriation) required by the laws

[8] Art. IV., § 3, cl. 2.

of the different priority states; that where there are, in a priority state, rival claimants to water from the same stream, one claiming as a prior appropriator and the other merely as a patentee of the United States to riparian land, both are United States grantees of the right to water, but the prior appropriator prevails to the extent of his appropriation over the subsequent patentee because of being the earlier grantee; that on the other hand where the patent to the riparian land is prior to the appropriation, the grant of the land carries with it a right to a riparian use of the water and, accordingly, to the extent of such riparian use the prior patentee prevails over the subsequent appropriator; that to the extent the United States, at the time of admitting a priority state into the Union, had not granted away its property rights in the use of the waters in the form of grants of riparian lands to patentees or of appropriations by appropriators, or has not done so since, the United States is still the owner thereof, with full power of disposition.

The Colorado doctrine may be put in this way: that while prior to statehood of the priority states the United States had sovereign jurisdiction over the waters, and appropriation rights acquired during that time were derivable exclusively from the United States, yet the riparian system never was in force in the areas afterward comprising the Colorado-doctrine states; that the conferment of state sovereignty vested in the state as an incident of such sovereignty over the waters the exclusive power to dispose of appropriation rights to the use of water not inconsistent with the rights previously disposed of by the federal government and to prescribe the persons who could acquire them and the terms and purposes of the acquisition; that subsequent to statehood an appropriator does not receive his water right as the grant of a pre-existing property right in and from the United States, but the right is conferred upon him by the sovereign power of the state.

Lux v. *Haggin*,[9] the leading case on the California doctrine, summarizes the priority phase of that doctrine as follows:

"Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on the public lands of the United States as having

[9] 69 Cal. 255, 338, 10 Pac. 674, 721 (1886).

a better right than a subsequent appropriator on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the State of California as the owner of innavigable streams and their beds. And since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval."

In *Willey* v. *Decker*,[10] Mr. Justice Potter, speaking for the court, deals with both doctrines in the following language:

"In that state (Montana) the doctrine more generally known, perhaps, as the 'California doctrine,' prevails. Stated briefly, that doctrine is that while a stream is situated on the public lands of the United States a person may, under the customs and laws of a state, and the legislation of Congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural, and other beneficial purposes, and to construct and maintain ditches and reservoirs over and upon the public land; such right being good against all other private persons, and by statute good as against the United States and its subsequent grantees; but that, when a grantee of the United States obtains title to a tract of the public land bordering on a stream, the waters of which have not been hitherto appropriated, his patent is not subject to any possible appropriation subsequently made by another party without his consent. . . .

"Upon that theory the right acquired by prior appropriation on the public domain is held to be founded in grant from the United States government, as owner of the land and water, under the acts of Congress of 1866 and 1870.

"In this state, on the other hand, the common-law doctrine concerning the rights of a riparian owner in the water of a natural stream has been held to be unsuited to our conditions; and this court has declared that the rule never obtained in this jurisdiction (*Moyer* v. *Preston*, 6 Wyo. 308). It was said in the opinion in that case that 'a different principle better adapted to the material condition of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation.'

[10] 11 Wyo. 496, 73 Pac. 210 (1903).

And, further, in explanation of the reasons for the existence of the new doctrine, it was said, 'It is the natural outgrowth of the conditions existing in this region of country.' The climate is dry, the soil is arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water are few; and while the land contiguous to water, and so favorably located as to naturally derive any sort of advantage therefrom, is comparatively small in area, the remainder, which comprises by far the greater proportion of our land otherwise susceptible of cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed by irrigation. Irrigation and such reclamation cannot be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose and a security accorded to that right. Thus, the imperative and growing necessities of our conditions in this respect alone, to say nothing of the other beneficial uses, also important, has compelled the recognition rather than the adoption of the law of prior appropriation.

"In view of the contention in Colorado that until 1876 the common-law principles of riparian proprietorship prevailed in that state, and that the doctrine of priority of right to water by priority of appropriation was first recognized and adopted in the constitution, the Supreme Court of that state, by Mr. Justice Helm, concluded a discussion of the matter as follows: 'We conclude, then, that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.' And it was further said that the latter doctrine has existed from the earliest appropriations of water within the boundaries of the state."

The Colorado doctrine of sovereign creation by the state has been adopted by the seven states wherein the priority system prevails exclusively, and the California doctrine of ownership and grant by the United States has been followed in the remaining priority states.

Theories Invoked to Legalize the Riparian System

The Colorado-doctrine states disclaim the riparian system altogether and, accordingly, put forward no theory to support it. They assert state sovereignty over the waters and then proceed by virtue thereof to declare them subject to disposition by the state under the priority system.

The California-doctrine states support their riparian system on the same theory they do their priority system,— grant by the federal government of a previously existing property right in the use of the waters vested in the United States. It is in consequence of this identity of theory that given a case in the same stream of a prior patent to riparian land and a subsequent appropriation from the same stream, the appropriator is subject to the riparian and vice versa,— that, in short, those states have a dual or hybrid system.

Federal Government *vs.* The State in the Supreme Court of the United States

We have seen that the states are divided on the question of whether it is the federal government or the state that has the power to dispose of the state waters and in doing so to determine the system the state shall have and the acquisition of rights thereunder.

The controversy, involving as it does, a federal question, is one for which the ultimate decision must come from the Supreme Court of the United States. That the federal government has jurisdiction over the streams of a state for two purposes is certain, and that court has so held: first (by the commerce clause of the federal constitution), over navigable streams to the extent of preserving the public right of navigation;[11] second (by Article III containing the grant of judicial power), in the case of an interstate stream, to secure to each state for its people the use of an "equitable," — not necessarily equal,—portion of the water for use therein.[12] But the first does not affect the disposition or determine the disposer of waters to the extent navigation is not impaired, and the second does not affect the disposition or determine the dis-

[11] United States *v.* Rio Grande Irr. Co., 174 U. S. 690 (1899).

[12] Kansas *v.* Colorado, 206 U. S. 46 (1907).

poser of the portion to which under the rule of equitable apportionment any given state is entitled for its people.

On the general question of whether it is the state or federal government which has the power of disposition a few opinions have been rendered, but they are not direct or harmonious enough to be considered as committing the court to a final decision. In *United States* v. *Rio Grande Irr. Co.* (*supra*), Mr. Justice Brewer in rendering the opinion asserted state sovereignty as against all but the United States, apparently not excluding even patentees of the United States, saying:

"It is also true that as to every stream within its dominion a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. . . . Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each state yet two limitations must be recognized:

"1. That in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States as the owner of lands bordering on streams to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of government property.

"2. That it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

". . . So far as those rules [reference here is to the rules of the priority system] have only a local significance and effect on questions between citizens of the state, nothing is presented which calls for any consideration by the federal courts."

Later in *Kansas* v. *Colorado* [13] the opinion of the court, written by the same Justice, still asserting state sovereignty, and this time not discussing limitations, contained the following:

"But it is useless to pursue the inquiry further in this direction. It is enough for the purpose of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters . . . it may determine for itself whether the common-law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West, of the appropriation of waters for the purpose of irrigation, shall control. Congress cannot enforce either rule upon any state."

[13] *Supra.*

In *Winters* v. *United States*,[14] which involved the question of whether a treaty with the Indians, setting aside for them certain lands as a reservation in the state of Montana, but saying nothing as to the waters flowing through the land, nevertheless created a right to the use of water by implication, Mr. Justice McKenna, writing the opinion in favor of the Indians, and apparently strong in his belief that the disposition of the waters is in the federal government, said:

"The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be."

In *Boquillas Land & Cattle Company* v. *Curtis*,[15] wherein the controversy was as to whether a riparian United States patentee claiming under an United States patent confirming a Mexican grant, had a riparian right in the water, the court by Mr. Justice Holmes deciding against riparian rights and recognizing the right even of a territory to reject the riparian system, said:

"It is not denied that what is called the common-law doctrine of riparian rights does not obtain in Arizona at the present date. Revised Statutes of Arizona, 1887, sec. 3198. But the plaintiff contends that it had acquired such rights before that statutory declaration, and that it cannot be deprived of them now; . . . They [the provisions relating to priority] simply follow what has been understood to be the law for many years. *Clough* v. *Wing*, 2 Ariz. 371. The right to use water is not confined to riparian proprietors . . . such a limitation would substitute accident for the rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land."

In *Los Angeles F. & M. Co.* v. *City of Los Angeles*,[16] the court, by Mr. Justice Day, declared that it was for the state of California to say whether a Mexican grant made prior to the cession to the United States carried a riparian right, the grant itself being silent as to waters. The state court had held against the existence of the rights. I quote from the opinion:

"In its opinion on the case at bar the Supreme Court of California said that in this respect it was following *Hardin* v. *Jordan*, 140 U. S. 371,

[14] 207 U. S. 564 (1908).
[15] 213 U. S. 339 (1909).
[16] 217 U. S. 217 (1910).

and this court has frequently held that the extent of the right and title of a riparian owner under a patent is one of local law. See recent decision of *Whitaker* v. *McBride*, 197 U. S. 510, a case therein cited."

It also is interesting to note that the United States Circuit Court of Appeals, Eighth Circuit, in *Snyder* v. *Gold Dredging Co.*[17] in holding that as between a prior riparian patentee and a subsequent appropriator in Colorado the patentee had no riparian rights, said:

"That by the settled rule of decision in the Supreme Court of the United States, conveyances by the United States of public lands on non-navigable streams and lakes, when it is not provided otherwise, are to be construed to have effect according to the law of the state in which the lands are situated in so far as the rights and incidents of riparian proprietorship are concerned. . . . Here it is not provided otherwise either by statute or by patent, and as has been seen the local law does not recognize a conveyance of the land as carrying any right to the unappropriated waters of the stream."

From the foregoing opinions it appears that the Supreme Court has leaned, or allowed itself to be quoted as leaning, at one time toward the idea of state disposition of waters, then toward federal disposition, then back again, and that the opinion of Mr. Justice Brewer in *United States* v. *Rio Grande Irr. Co.* is scarcely consistent with itself, for if the state as against the United States itself cannot reject the riparian rule yet may do it as against the grantees of the United States, it would seem either that the United States itself had no property right at all in the right to use the waters and, therefore, could not complain of the rejection by the state, as against the United States, or else that having such property right Congress ought to be permitted to dispose of it to grantees under Art. IV, § 3, cl. 2, conferring on that body "the power to dispose of . . . the territory or other property of the United States."

Distinction between Sovereign Jurisdiction and Ownership

The question being an open one in the Supreme Court let us, with deference, assume to consider what the decision ought to be.

In the ensuing discussion, the phrase "political state," tautological though it may be, will be used as the equivalent of the term

[17] 181 Fed. 62 (1910).

"state" in political science, "a particular portion of mankind viewed as an organized unit," [18] and in contradistinction from a member state of the Union. For such a member the word state or commonwealth is reserved. Viewed from the standpoint of political science the federal government and the commonwealth are but agencies of that one of the world's political states called the United States of America.

With confusion of terms out of the way the first thing for us to do is to acknowledge the distinction [19] between sovereignty and ownership, between *imperium* and *dominium*. For it may be said that if prior to the statehood of the priority states the relation of the United States to the running streams was one of ownership or property either in the waters themselves or in their use, then the United States is the owner still, for it is not permissible to argue that there is anything in the conferment of statehood, which any more requires a transfer to the state of property in respect to waters, than in respect to lands or anything else. All that is necessary is a transfer not of property but of sovereign jurisdiction. Of whatever, on conferment of statehood, the United States remained the owner, of that, Congress, under the constitutional provision already alluded to, retained full power of disposition. But if the relation of the United States to the waters was one of sovereign jurisdiction and not of ownership, then, it may be that the power of disposition passed, upon conferment of statehood, to the states and now belongs to them.

There are some who, assuming that the United States had a property in the waters or in the use of them, contend that the property right passed to such of the priority states as had state constitutional provisions asserting state or public ownership of the waters. If this be the only theory of supporting a power in the state to dispose of the waters, only some of the states would have the power, for only some have constitutional provisions of this character. Furthermore, since the primary purpose of the process of admitting a state into the Union is to admit it into the Union rather than to make contracts transferring property of the United States to the state, there are good reasons to doubt, especially as to certain

[18] Burgess on Political Science & Constitutional Law, p. 53.

[19] Mobile *v.* Eslava, 16 Pet. (U. S.) 234 (1842); Willey *v.* Decker, *supra* n. 10.

states, whether such provisions should have the contractual effect thus ascribed to them.

Let us recur to the distinction between sovereignty and ownership. For a political state to exercise sovereignty throughout its geographical sphere is one thing; to own in a strict proprietary sense what is within that sphere is another. Most political states do not own the greater number of things within their borders, but permit them to be owned privately, exercising, however, sovereign jurisdiction over them. Many things, of course, political states actually own; for example, governmental buildings, museums, libraries, and frequently, public service instrumentalities. In these instances the political states sustain the dual relation of sovereign and owner. More things, indeed everything, could be owned by the political state if the latter wanted to become the owner. All that would be necessary would be the exercise of the sovereign jurisdiction in that behalf. Such a complete exercise, however, would be unwise and is unlikely.

As to lands of the United States situated within a state the relation of the United States thereto is one of ownership, not of sovereignty, while that of the state is one of sovereignty, not ownership, except that where the lands are bought by the consent of the state legislature for "forts, magazines, arsenals, dockyards, and other needful buildings" the sovereign and proprietary powers are, under the federal constitution [20] united in the United States. Said the United States Supreme Court in *Pollard* v. *Hagan* [21] in a case involving the relation of the United States to certain of its lands within a state:

"The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted."

The same court in *Kansas* v. *Colorado* [22] declared:

"These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitu-

[20] U. S. Const., Art. I, § 8, cl. 16.

[21] 3 How. (U. S.) 212 (1845).

[22] *Supra.*

tion, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the Western states, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer states, yet the powers of the National Government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

The distinction between sovereign jurisdiction and ownership is not one of quantity, — as between the whole and the part, — but of cause and effect. It is one of the functions of sovereign jurisdiction to create ownership, — in other words, to determine what things are not subject to ownership and what things are, and as to the latter, who shall own them and how the ownership may come about, and what shall be the estates in the thing owned. The ownership created may be either private or in the political state itself, but whether in the one or in the other, or not created at all, the political state still possesses what is greater, although different, — the supreme power of sovereign jurisdiction over persons and things within its geographical sphere, and through its exercise, now in this direction, now in that, may accomplish this or that result of legal significance, whether it be ownership, rule of contract, definition of crime, or what not. It is to be noted, however, that because sovereign jurisdiction has the power to accomplish this or that result we are not to infer necessarily that it has done so. A result cannot exist before it is caused. There are many things which sovereign jurisdiction can do, but which it has not done. Declaring all crimes capital is one of them. Making statutes of limitations different from what they are is another. Possibly to come directly to our question and to take the United States as an example, the creation of ownership or property in the United States either in running waters, or in the use of the running waters, on the public domain, later and now included within the priority states, is yet another.

The Federal Government Exercised Sovereign Jurisdiction but was Not the Owner

Is, then, the right to choose systems and dispose of waters thereunder a function of the state? Did the United States really own in a proprietary sense the waters or rights of use in the priority states previous to statehood?

The answer to these questions involves an inquiry into the nature of property in running waters or in the right to use them, and also into the relation of the political state thereto.

Running water itself is not subject to ownership at all. Water running stays with no one but travels far. It crosses lands of different owners, flows past many cities. Sometimes its track is the boundary line between nations. At other times the flow is from one nation into another. This travelling character of running water has fixed its legal status as a thing not subject to ownership, but rather to be classed with other natural media which, although not subject to ownership by any one, are open to the common enjoyment, such as air, light, and wild game. This is true by Roman law,[23] civil law,[24] common law,[25] and by the priority law of the western states.[26] When property exists in respect to running waters the property consists not in the water itself in the natural state, but in the right of use. It is the *usufruct*, not the *corpus*, that is owned.

If in making the use, a portion of the running water is completely severed from the natural source and reduced to possession, property may exist in the severed portion itself,[27] but in respect to the water while running in the stream the property, when property exists, is in the right to make a use and not in the *corpus*.

The relation of the political state to running water is not one of ownership, for the trait of running as much unfits the water for ownership by the state as by individuals. As well might one say that the political state owns several of the other natural media. The startled hare, the wild duck, the air particles that cross every

---

[23] Institutes of Justinian, lib. 2, tit. 1, § 1.

[24] Pothier, Traité du Droit de Pro-priété. No. 21; Aubrey & Rau, Droit Civile Français, 4 ed., vol. II, p. 34; Eschriche, Aguas.

[25] Bracton, lib. 2, f. 7, § 5. Embrey *v.* Owen, 6 Ex. 353 (1851).

[26] Wyatt *v.* Larimer, etc. Co., *supra*.

[27] Embrey *v.* Owen, *supra;* City *v.* Stacey, 169 N. Y. 231, 62 N. E. 354 (1901).

day the boundary line between the United States and Canada, — whose are they while in their condition of nature? No one's. They belong neither to man nor nation unless or until reduced from that natural condition to one of human possession. The law as to these things might be different. It is conceivable that the political state might say that property should exist in these media while in their natural condition; that the hare, for instance, would be the property of A. while on A.'s land, of B. while on B.'s land, or of the political state while within the boundaries thereof, and of the neighboring political state while within the boundaries of the latter. It would be property, however, which would change its owner a dozen times a day, depending upon its physical position, — a peculiarity so violative of all our ordinary ideas of property that we are quite satisfied to leave these things as they are now, exempt, while in their natural condition, from being subject to ownership at all. The true relation of the political state to these natural media is one of sovereign jurisdiction and control rather than of ownership, — *imperium* rather than *dominium*. In the exercise of that jurisdiction and control the political state, without actually owning these things itself or permitting others to own them, provides for their protection when necessary, regulates their use, and prescribes upon what terms title to rights of use may be obtained and by whom. Not only does the political state not own in any proprietary sense the *corpus* of the running water, but it does not necessarily or ordinarily own in any such sense even a right to use the *corpus*. True, it has sovereign jurisdiction over the *corpus*. Therefore, it may if it pleases exercise that jurisdiction in such wise as to create definite property rights in the *corpus* or in the use of the *corpus*, either in favor of itself or in favor of others, but until exercised the property right either in the *corpus* or in the use of it has not been created. If there be in the political state ownership of the waters or of the right to use them it is mere "political ownership" for the common enjoyment, not for the political state in its private or proprietary capacity.

Some of the Colorado-doctrine commonwealths, bent on putting the waters as far as possible beyond the control of the federal government, have adopted constitutional provisions declaring the waters to be the "property of the public" [28] or the "property of

[28] Colorado Const., Art. 16, § 5.

the state." [29] Even these provisions which are substantially the same in effect [30] are not considered as vesting the state with any property right in the waters or in their use but as affirming sovereign jurisdiction over them. As was said by Mr. Justice Potter in *Farm Investment Company* v. *Carpenter*: [31]

"There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration, that the water is the property of the public, and that it is the property of the state.

"It is said in *McCready* v. *Virginia*, 94 U. S. 391, in discussing the subject of tide waters: 'In like manner the states own the tide waters themselves. . . . For this purpose, the state represents its people, and the ownership is that of the people in their united sovereignty.' See also *Martin* v. *Waddell*, 16 Pet. 410; Gould on Waters, sec. 32; Kinney on Irrigation, secs. 51, 53; *Bell* v. *Gough*, 23 N. J. L. 624. 'The Sovereign is trustee for the public.' 3 Kent's Com., 427; *Miller* v. *Mendenhall* (Minn.), 8 L. R. A. 89.

"The ownership of the state is for the benefit of the public or the people. By either phrase, 'property of the public' or 'property of the state,' the state, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity."

The same Justice said also in *Willey* v. *Decker*: [32]

"The obvious meaning and effect of the expression that the water is the property of the public is that it is the property of the people as a whole. Whatever title, therefore, is held in and to such water resides in the sovereign as representative of the people. The public ownership, if any distinction is material, is rather that of sovereign than proprietor."

Now when the United States acquired from the ceding nations the arid western lands which later comprised the priority states, the United States became possessed of sovereign jurisdiction and control over the waters flowing upon and through them. Out of that sovereignty the United States could have created ownership consisting of a right to use the waters or, for that matter, consisting of the very waters themselves had it wanted to do so, but we do not ascribe any such exercise of sovereign power merely from the acquisition of it, where nothing indicates the exercise and

[29] Wyoming Const., Art. VIII, § 1.

[30] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 138, 139, 61 Pac. 258, 265 (1900).

[31] *Supra.*

[32] *Supra.*

where the practice of political states is against it. The United States then never became the owner in any proprietary sense of either the *corpus* of the running water or of a right to use it.

But, says some one, — did not the United States prior to the statehood of the different priority states, grant water rights under the Act of '66 and other federal statutes, and could this have been done unless the United States already owned as property the rights granted? By way of answering it may be said that in order for the United States to vest in another a property right in water or in the use of water it was not necessary that the property right should have been owned by the United States. Property rights are the product of sovereign jurisdiction. Without its exercise, express or implied, they cannot exist even in the political state itself. Why, then, must the political state in order to vest a property right in another first create the right in itself and then transfer it instead of taking the short cut of creating the right in the other in the first instance? Private owners, indeed, may not grant property rights unless owning them, but political states are not necessarily so limited. They may grant or create, — the word matters little if we understand the sense, — property rights directly out of their sovereign power. The man who produces liquefied air becomes the owner of it, but surely no one would contend that the political state actually owned the air before it was liquefied. Nor does the political state own the wild game before reduction to the possession of the hunter. The opinion of the court by Mr. Justice White in *Geer* v. *Connecticut*[33] declares and cites state supreme court authorities in support, that in the United States wild game, although subject to the sovereign jurisdiction of the state is not owned by the state in any proprietary sense. The following passage is taken from the opinion:

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals

[33] 161 U. S. 519 (1896); accord, *Ex parte* Bailey, 155 Cal. 472, 474, 101 Pac. 441 (1909).

as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin* v. *Waddell*, 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the state, is thus stated in a well-considered opinion of the Supreme Court of California.

"'The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.' *Ex parte Maier* (103 Cal. 476).

"This same view has been expressed by the Supreme Court of Minnesota, as follows:

"'We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common.' *State* v. *Rodman* (58 Minn. 393)."

But, says another, — when the United States originally acquired the lands did not the common law affix a riparian right thereto? The common law is a persistent thing. It has circled the globe. But it is not a straight-jacket into which may be thrust, willy-nilly, sovereignty itself. The common-law rule of riparian rights did not attach unless it was the law of the United States that it should attach. The United States never declared itself in favor of any such law expressly. The rights that it thus far has expressly defined by its statutes, as by the Act of '66 and the Desert Act of '77, have been, although in favor of other persons than the United States itself, rights of the contrary variety, — by appropriation. Nor should the law of riparian rights be presumed to have attached by implication grounded on any theory of its supposed desirability. Indeed, the implication would be the other way. The domain acquired by the United States was a vast one to which the common-law rule confining the use of waters to riparian lands was not adapted, and the expectation was that ultimately the domain would be organized into states and the latter admitted to the Union. Under such circumstances how much better from an economic and a political point of view to regard the United States as owning no riparian rights in the waters but rather as possessing that larger power of sovereign

jurisdiction out of which could be created later on whatever water system and rights thereunder might prove the most desirable and to the states thereafter to be created the most acceptable! These considerations are sufficient to negative the idea that the common-law riparian rule became the law of the United States by any implication based on desirability. Indeed, it is a rule of the common law itself to abolish a given one of its other rules when the reason for it ceases. Or, to put the idea in a different tongue, — "*Cessante ratione lège, cessat et ipsa lex.*"

But did not the treaties of cession, whereunder the public domain was acquired, vest in the United States a riparian property right? They do not say so,[34] and since the public domain acquired by the United States was public domain of the ceding nations the same considerations which render the riparian rule undesirable to the United States must have made it equally so to them. Furthermore, the larger part of the lands of the arid West were acquired from old Mexico, and as to a considerable portion of such part, namely the portion once falling within the Mexican state of Sonora, the riparian rule did not exist, but, instead, the rule of appropriation.[35]

The States Succeeded to the Sovereign Jurisdiction of the United States, and therefore to the Disposition of the Waters

When under our federal political system of divided sovereignty the priority states, California, Colorado, and the rest, were admitted one by one into the Union, they succeeded to the general sovereign jurisdiction formerly possessed by the United States over such of the running waters of the public domain of the United States as were within their respective boundaries.[36] Although speaking not of water but of another of the natural media, Mr. Justice White said, in *Geer* v. *Connecticut*[37] already once quoted:

---

[34] Guadaloupe Hidalgo, 9 Stat. L. 928; Louisiana Purchase, 7 Fed. St. Ann. 542; Boundary Treaty, 7 Fed. St. Ann. 587; Gadsen Purchase, 7 Fed. Stat. Ann. 704.

[35] Boquillas Land & Cattle Co. *v.* Curtis, *supra* n. 15.

[36] Geer *v.* Connecticut, 161 U. S. 519, 527, 528; Pollard *v.* Hagan, *supra* n. 21.

[37] Kansas *v.* Colorado, *supra.*

"Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power that the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution."

The succession of the state in respect to the running water was to power, not to property, for of the latter the United States had none.

Out of the power thus acquired the states could, as could and did the United States before them, create property rights in the use of the waters, — could determine the water system and dispose of water rights thereunder. The exercise of this power would be subject only to such appropriation rights as the United States prior to the statehood of any given state had already created, upon appropriations being made under federal statutes, notably those of '66 and of '77, above referred to, when agreeable to "local customs, laws and decisions."[38] The old appropriation rights did not harass or annoy the states in the exercise of the new power, for the creation of the rights had been by the federal statutes themselves conditioned, as we have seen, upon agreeableness to "local customs, laws and decisions of court" and the conferment of state sovereignty did not change the local popular will or policy favoring the priority system.

Analysis of Further Authorities

We ought to analyze further some of the federal statutes already referred to, and also a number not even mentioned, to ascertain how well they square with the main propositions advanced in this discussion, but the analysis would require more time than the occasion permits. I can only say that the statutes in the main appear to be consistent with what has been advocated here, and that where they are not, they amount at most to implied declarations that there exists in Congress a power of determining who may acquire property rights in the waters or in their use, and the terms of the acquisition. Such declarations are without effect on the states, for the power referred to passed along with other powers of

[38] A. C., July 26th, '66.

general sovereign jurisdiction to the states, upon the conferment of statehood. When once a state has come into being any and all subsequent declarations by Congress, either of ownership or of powers of disposition, come too late. The sceptre has passed.

Conclusion

If what has been advocated here is true we now have reached the following conclusions: first, that the United States acquired from the ceding nations sovereign jurisdiction over the running waters but not property in them or in their use; second, that prior to conferment of statehood upon the priority states the United States never exercised this jurisdiction to create in itself a general proprietary right either riparian or by appropriation or otherwise, but only to create appropriation rights in others where agreeable to "local customs, laws and decisions;" third, that when the priority states were admitted to the Union they succeeded the United States in the general sovereign jurisdiction over the waters, with no property interest therein or in the use thereof outstanding in favor of the United States; fourth, that this sovereign jurisdiction acquired by the priority state is subject to three restrictions, sovereign not proprietary in character, one of them being that the United States may not in the case of an interstate stream deprive the other state or states of its or their "equitable" portion of the water of the stream, another being that navigability of navigable streams must not be impaired, and the last being subjection to priority rights created by the United States in appropriators prior to statehood; fifth, that under and by virtue of the sovereign jurisdiction thus acquired and to the limitations mentioned, the state became the lawful disposer of the waters; with power to select any water system desired, whether priority, riparian, or, probably, as in the California-doctrine states (and notwithstanding the unsound legal reasoning of that doctrine, to say nothing of its economic inconsistency) the priority and riparian combined, to determine the persons who could acquire rights under the system chosen, the purposes for which the acquisition could be made and the incidents thereof; and with power in the Colorado-doctrine states to dispose, to the exclusion of the federal government, of all the waters not then or yet appropriated.

L. Ward Bannister.

Denver, Colorado.